SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1034

GEORGE F. DRISCOLL COMPANY,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

JOSEPH J. COTTER,
JAMES C. ROGERS,
ARTHUR J. PHELAN,
Counsel for Petitioner.

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GEORGE F. DRISCOLL COMPANY, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

George F. Driscoll Company, a corporation, respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the Court of Claims of the United States in the above entitled case (its Docket No. 45455) entered October 1, 1945 (R. 38) denying recovery to petitioner.

Opinions Below

The opinions of the Court of Claims (R. 22-38) are not yet officially reported.

Jurisdiction

The judgment of the Court of Claims was entered October 1, 1945 (R. 38). Motion for new trial was filed, and said motion was denied January 7, 1946 (R. 38). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended.

Contract Provisions Involved

Contract provisions involved in this case are Article 10 (R. 12) and Article 15 (R. 14) of the United States Standard Form of Contract.

Summary Statement of Matter Involved

This was a suit to recover the reasonable cost of work done, namely, the repairing of a broken water main, for the benefit of the United States. The break was the result of an accident. The work of repairing it was outside of any express contract that petitioner had with the United States.

Petitioner is a general contractor. On October 22, 1934 it was awarded a contract for the construction of certain buildings and alterations of others at the United States Immigration Station, Ellis Island, New York. During the course of its work a number of wood piles were required to be driven at specified locations. After a number of the piles had been driven on 6-foot centers, petitioner approached a point where it became apparent that the next pile to be driven would be directly over or very close to the apparent location of an underground water main. This supposed location was determined by both petitioner's engineers and the government engineers by sighting a straight line between two known points of the main. One of these points was a mark on the seawall where the main entered the island, and the other a vertical riser 100 to 125 feet inland.

The work was stopped and a conference was held between petitioner's engineers and those of the government, and the government's engineer determined to change the location of the next pile to be driven. He indicated the place where he wanted the next pile to be driven (R. 27). Petitioner, following instructions given by respondent's engineer, probed with a rod over the place selected for driving the pile to determine whether or not the main was below the point designated (R. 27). After the probing was completed, and it was concluded the main was not below the area where the pile was to go, respondent's assistant construction engineer authorized petitioner to drive the pile at the point indicated. The pile was driven in the presence of respondent's construction engineer, as was required by the specifications (R. 22).

The only information available as to the depth of the main at the point of the probing came from the government's superintendent of Ellis Island, who said he thought it was down about 10 feet below grade. Petitioner probed down to a depth of 16 feet 6 inches. Subsequent events showed the main was 16 feet 9 inches below grade (R. 27).

Later in the day it developed that the water pressure on Ellis Island was dropping and it looked as though the water main had been broken by the pile in question. The next morning there was no water supply on the island, and many buildings, including a hospital, were in urgent need of water. It was then a certainty that the pile had broken the main. Clearly, an emergency existed. Respondent's construction engineer orally instructed petitioner to proceed to repair the broken main at once, which it did as quickly as possible. Petitioner never received any specific order in writing for the work. The main was broken on May 1, 1935. It took approximately one week, working twenty-four hours a day, to make the necessary repairs. Many difficulties were encountered. It was necessary to employ a diver to com-

plete the repairs after sea water had broken through the excavation. In the meantime, petitioner hauled water by tugboats from New York City to the island, and extended one thousand feet of fire hose from the Jersey shore to the island and water was supplied through the hose.

The question then arose as to whether petitioner was legally liable to pay for the damage that resulted from the accidental breaking of the main.

On May 3, 1935, two days after the break, plaintiff, in writing, advised respondent that it expected to be reimbursed for all costs of repairs made necessary by the break. R. 28). On May 11 respondent's chief engineer wrote petitioner that it was his opinion there could be no claim for additional compensation for the repair of this damage because if the provisions of paragraphs 987, 988, 989 and 1003 of the specifications had been followed the damage to the water main would not have occurred. Those paragraphs of the specifications have no application whatsoever to the situation that confronted both petitioner's engineers and those of respondent on May 1, 1935 when the pile was driven. (See Special Finding of Fact No. 5, R. 23-25). Petitioner was not required under its contract to touch the horizontal main. (See R. 26 and Par. 1075 of specifications, R. 24).

Cleanup work following the repairs was done at various times up to May 29, 1935. On June 5, 1935 petitioner wrote the Procurement Division, Public Works Branch, Treasury Department, the department of the government issuing the contract, requesting payment for the work incident to the repair of the main. Petitioner's contract was signed by the Acting Director of Procurement, Treasury Department (R. 20). On September 16, 1935 the Acting Assistant Director of Procurement wrote petitioner that the additional expense incurred in the repair of the main would have

to be assumed by petitioner, but said, "This office will interpose no objection, in the event you desire to present an appeal from this decision to the Office of the Comptroller General of the United States."

The Procurement Division of the Treasury Department made no suggestion that petitioner appeal to the Secretary of the Treasury. There seems to be confusion in the opinions below as to whether the Construction Engineer or the Director of Procurement was the Contracting Officer, and there is no finding of fact as to this.

Acting upon the suggestion of the Assistant Director of Procurement, petitioner submitted the matter to the Comptroller General who, on May 12, 1939, denied petitioner's claim. Petitioner then instituted suit in the Court of Claims of the United States, seeking to recover its costs incident to repairing the main. It alleged that the breaking of the main was not due to any negligence or want of care on its part (R. 3).

Petitioner's contract was the Standard United States Government Form of Contract. It contained the usual provision that

> "* * * all other disputes concerning *questions arising under this contract* shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime, the contractor shall diligently proceed with the work as directed."

The contract also provides that "The contractor shall, * * * be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work * * *" (R. 12).

There is no dispute between the parties as to the reasonableness of petitioner's costs incident to the work involved, nor is there any dispute in the case as to any of the essential facts.

This case was reached for trial in the court below (see Rules 88 and 89 of the Court of Claims of the United States) on October 4, 1944, and was argued and submitted (R. 21). On January 8, 1945 the Court of Claims remanded the case to its general docket and reset it for oral argument on February 5, 1945. However, by order of the court on January 19, 1945 the remand order was revoked (R. 21). On October 1, 1945 the court below entered special findings of fact, conclusions of law based thereon, and its opinion (R. 22).

There were four opinions filed in the case (R. 22-38). One opinion, filed by Judge Littleton, held that the petitioner could not recover because the contracting officer, on the facts as he interpreted them, decided "the dispute", that is, who was to respond in damages for the breaking of the water main, against petitioner, and that his opinion was final as no appeal was taken to the head of the department concerned. This opinion was concurred in by one other judge, Chief Justice Whaley. However, these two judges said, "Except for this, plaintiff would be entitled under the findings to recover $7,787.12, as set forth in Findings 16 and 17."

Another judge, Judge Jones, who at the time of the trial was on leave of absence from the court and was engaged as War Food Administrator, filed what was designated as a concurring opinion[1] (R. 34). He disagreed with the reasons given by the other two of his colleagues who held that petitioner could not recover. He apparently disagreed with their conclusion that the facts of this case presented

[1] It is submitted that this Court can take judicial notice of the fact that Judge Jones of the Court of Claims of the United States was, on October 4, 1944, on leave of absence from the court and was acting as War Food Administrator, and that he returned to duty on the court in June of 1945.

a dispute under the contract for the decision of the contracting officer. He also disagreed with their conclusion that except for the decision reached by the contracting officer petitioner could recover. He went further and found petitioner "at fault" though he makes no reference to the findings of fact that justify such a conclusion. If he agreed with the other two judges who found that petitioner was not entitled to recover, that the facts of this case presented a dispute under the contract, it was unnecessary for him to determine the merits or demerits of petitioner's conduct.

The other two judges of the court below, Judge Whitaker and Judge Madden, dissented, and each filed an opinion. Each held that under the facts of this case there was no dispute for the decision of the contracting officer; that plaintiff was not guilty of any negligence and, hence, it should recover.

There is therefore presented to this court, with the request that it review it, an anomalous situation. Four judges have found petitioner not guilty of negligence in breaking the water main; one judge has found that it was at fault. Three judges hvae indicated that the case did not present a dispute for the decision of the contracting officer. Two judges have found that it did. Therefore, without a majority of the court below agreeing upon either of the questions presented by the facts and circumstances of this case, petitioner is denied recovery.

Two distinct questions confronted the court below after it made its determination of the facts. Both were questions of law. The first question, a preliminary one, was whether under the facts as found there existed in May of 1935 a dispute between petitioner and respondent *under the contract* for the determination or decision of the contracting officer. The second question, the real question in the case, was—Did

petitioner negligently damage respondent's property and, hence, is it liable for the cost of repairing that damage? Stated another way, if it got by the first question the court had to determine whether or not, upon the facts as found, petitioner acted as any ordinarily prudent contractor would have acted under the circumstances.

After a trial, attended by only four of the judges, two judges decided the first legal question against petitioner. The other two judges decided it in favor of petitioner. All four of the judges decided the second legal question in favor of petitioner. The fifth judge, upon his return to the court many months after the trial, made no specific finding as to the first question but inferentially decided it in petitioner's favor by going into the merits of petitioner's conduct and predicating his conclusion that petitioner could not recover upon his determination of the second question. He disagreed with the other four judges and found petitioner at fault.

A motion for a new trial was filed in the court below. That motion was denied without opinion.

Questions Presented

1. What is the scope and meaning of the term "disputes concerning questions arising under this contract" as used in Article 15 of the Standard United States Government Form of Contract?

2. Does the contracting officer have the right to determine under Article 15 of the Standard United States Government Form of Contract that a contractor negligently damaged government property and, therefore, must respond in damages, particularly when the contractor under its contract was not required to handle or touch the item of property damaged?

3. Under Article 15 of the Standard United States Government Form of Contract is the decision of a contracting officer, from which no appeal is taken, on a question of law binding and conclusive upon the Court of Claims of the United States? Can such a question be made the subject of final determination by an administrative officer of the government?

4. If Article 15 of the contract was intended to apply to the facts and circumstances of this case, could it validly be agreed to by the parties?

5. Are the essentials of due process met in a case such as this where the majority of the Court of Claims of the United States has not decided either of the two questions involved in the case against petitioner, yet recovery has been denied?

Reasons Relied On for Allowance of the Writ

1. To avoid further confusion this Court should take this case and clarify the question as to what is a dispute arising under a contract within the meaning of Article 15 of the Standard United States Government Form of Contract. The effect of the opinion of two of the judges below, which has been treated as a majority opinion although apparently not concurred in by the three other members of the court, is to hold that any disagreement, whether it be legal or factual, between a person holding a government contract and the government comes under the contract and can be conclusively determined either by the contracting officer or the head of the department concerned. If that opinion is upheld the jurisdiction of the Court of Claims is limited only to those decisions fraudulently determined by the contracting officer or the head of the department, or those so grossly erroneous as to imply bad faith. See R. 33.) The

fact that confusion reigns is clearly indicated by the three opinions filed in this case dealing with this question.

2. The opinion of the two judges who held that petitioner should have appealed to the head of the department concerned is in direct conflict with the decision of the Court of Claims in the case of *Beuttas* v. *United States*, 101 Ct. Cls. 748, decided after the decision of this Court in the case of *United States* v. *Blair*, 321 U. S. 730, and the case of *Langevin* v. *United States*, 100 Ct. Cls. 15, decided just prior to it.

3. Certiorari was granted in the case of *Beuttas* v. *United States, supra*, by this court at the request of the government. By its petition in that case the government recognized the importance of the questions raised by this petition. Upon consideration of that case upon its merits this Court, in *United States* v. *Beuttas*, 324 U. S. 772, decided on April 23, 1945, found it unnecessary to decide the questions raised herein as it felt that that case could be disposed of on other grounds. In that case this Court said:

> "The respondent's contention is that if Article 15 be construed to cover such a dispute it is void as an attempt to oust the jurisdiction of the Court of Claims to decide a pure matter of law, namely, whether on the facts found, the petitioner had broken the contract."
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> "The parties devoted much of their argument here to the question whether only questions of fact, or questions of mixed law and fact can by contract be made subject to final determination by an administrative officer of the government or whether a question of law may also, by contract, be made subject to final determination by such an officer. Our cases have not specifically drawn any distinction between the two categories. * * *"

The Court of Claims has drawn a distinction but has done so inconsistently. Compare the case at bar with *Beuttas v. United States,* 101 Ct. of Cls. 748.

4. It is respectfully urged that this Court should determine and delimit the authority of the contracting officer and head of the department concerned to act under Article 15 of the Standard United States Government Form of Contract. Questions raised in this case are of primary importance in the field of government contracts. This Court should settle the issues herein raised and give the court below a guide that will permit it to know how much of its jurisdiction has been usurped by the government departments that employ the Standard United States Government Form of Contract involved in this case.

5. This Court should also determine the question as to whether or not three judges of the Court of Claims of the United States must concur on any given point before a decision can be reached. The court is one of original jurisdiction. The rules of that court designate the hearing before the court as a trial. As heretofore indicated, there were two issues in the case before the court below, and a majority of the court in each instance has, inferentially at least, determined both of those issues in petitioner's favor, yet recovery has been denied. While this question appears to be unique insofar as the Court of Claims of the United States is concerned, the question is an important one and one with substantial ramifications affecting both administrative procedure before many Commissions and hearings before three-judge courts.

6. The uncertainty resulting from the diverse views in the opinions below calls, we submit, for the exercise of this Court's power of review. At the present time, under the existing decisions of this Court and the court below,

it is difficult to determine what is required of a contractor or what is required of a contracting officer or head of a department concerned in the event of a dispute, and much uncertainty exists as to what, if any, jurisdiction the Court of Claims of the United States has left over controversies between a contractor and the government where the contract contains a provision similar to that of Article 15 involved in the instant case. Since the court below is, for all practical purposes, the exclusive forum for the settlement of claims against the United States, a review by this Court is important to resolve the divergencies in the opinions below, not only for the sake of this case but more generally in the interest of certainty and uniformity of decision. Compare the grant of certiorari in *Landis* v. *North American Company*, 299 U. S. 248, in *John Hancock Insurance Co.* v. *Bartell*, 308 U. S. 180, and *Federal Communications Commission* v. *National Broadcasting Company, Inc., et al.*, 319 U. S. 239.

Conclusion

For the reasons stated, it is respectfully submitted that this petition should be granted.

GEORGE F. DRISCOLL COMPANY,
Petitioner.

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